Supreme Court, U.S.
FILED
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92-1932

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

RAY G. BESING and RAY G. BESING & ASSOCIATES, P.C.

Petitioners,

v.

LYN NOBLE HAWTHORNE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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May 5, 1993

13 pp

QUESTION PRESENTED

Whether a state court judgment based on sanctions disposing of Petitioners' claims without an evidentiary hearing constitutes a transfer of Petitioners' claims for reasonably equivalent value under 11 U.S.C. §548 as a matter of law.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are Ray G. Besing, a Dallas, Texas attorney; Ray G. Besing & Associates, P.C., a professional corporation for the practice of law in Dallas, Texas and Lyn Noble Hawthorne, an individual residing in the Conroe, Texas area.

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PETITION FOR WRIT OF CERTIORARI

Ray G. Besing & Associates, P.C. and Ray G. Besing, Individually, respectfully petition that a Writ of Certiorari be issued to review an opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW AND GROUNDS FOR JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit dated February 4, 1993, is reprinted as Section A of the separate Appendix at pages A1-A11. The Judgment and Order of the United States District Court for the Northern District of Texas, Dallas Division, both dated and filed November 21, 1991, are reprinted as Section B of the separate Appendix at pages B1-B3. The Order of the United States Bankruptcy court for the Northern District of Texas allowing Respondent's claim and overruling Petitioners' Objection to claim dated February 21, 1991, and the Judgment of said Court dated the same date are reprinted as Section C of the separate Appendix at pages C1-C2. The Bankruptcy Court's Rulings ("Rulings") are reprinted as Section D of the separate Appendix at pages D1-D9.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND RULE PROVISIONS INVOLVED

The relevant sections of Title 11 U.S.C. and Title 28 U.S.C. are listed in the Table of Authorities.

STATEMENT OF THE CASE

Petitioners, an attorney and his professional corporation, are both Debtors in bankruptcy cases filed in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division. The cases are being administered together. Respondent filed a proof of claim in the jointly administered cases relying on a state court judgment stemming from a determination of an alleged discovery abuse as a result of actions by the attorneys for the Petitioners in the state court action. (Sections F and G of the Appendix).

The individual Petitioner objected to the claim filed by Respondent on the ground that the affirmative state court judgment obtained by Respondent as well as the dismissal of Petitioner's state court claims and defenses through the striking of pleadings constituted a fraudulent transfer under Section 548 of the Bankruptcy Code ("Code"). (Appendix, Section E, pp. E1-E2).

The Bankruptcy Court held that no transfer as defined by the Code and envisioned by Section 548 of the Code had occurred. The Bankruptcy Court thus did not reach any of the other issues to be resolved in determining whether the state court judgment constituted a fraudulent transfer.

The United States District Court for the Northern District of Texas, Dallas Division, affirmed the Bankruptcy Court. A majority of the panel of the United States Court of Appeals for the Fifth Circuit ("the Court of Appeals") affirmed the decisions below but on a different ground. The Court of Appeals held that the state court judgment dismissing Petitioner's claims against Respondent was a transfer. The Court of Appeals, however, did not reverse the lower court but instead affirmed concluding that the state court's disposition of Petitioners' claims constituted a transfer for reasonably equivalent value as a matter of law. Thus

the Court of Appeals concluded that the judgment of the courts below should be affirmed because Petitioners could not, as a matter of law, prove a necessary element of their claim that the transfer was for less than reasonably equivalent value as required by Section 548 of the Code.

Petitioner's claims and defenses in the state court were dismissed for alleged discovery abuse. (Appendix, Section G). Such claims would have served to defeat or offset Respondent's state court claims later reduced to judgment which judgment is the only basis for Respondent's proof of claim. Petitioners' claims in the state court case which were eliminated by the striking of Petitioners' pleadings are reflected in the document entitled Plaintiffs' Second Amended Original Petition ("Petition"). (Appendix, Section H).

The Petition alleged claims against Respondent for specific performance of a settlement agreement or alternatively for damages and the recovery of properties, the total of which claims exceeded the claims made by Respondent for which she obtained a judgment without trial.

Although the Final Judgment upon which Respondent based her proof of claim purports to grant a summary judgment in favor of Respondent, the summary judgment related only to the relief sought by Respondent which would have been more than offset by the relief sought by Petitioner.

Moreover, close reading of the Final Judgment demonstrates that it is based on the Order of Sanctions with respect to alleged discovery abuse which is included as Exhibit G of the Appendix. In short, no true summary judgment procedure occurred as is evident on the face of the Final Judgment.

In any event, Petitioners contend that the State Court's Final Judgment does not determine as a matter of law that the transfer of Petitioners' claims effected by such Final Judgment was for reasonably equivalent value. Petitioners believe they are entitled to show that the transferred claims had value and that the state court judgment could be avoided thereby creating a valid and dispositive objection to Respondent's proof of claim.

REASONS FOR GRANTING THE WRIT

The Court of Appeals in affirming the courts below, specifically held, contrary to the courts below, that the state court judgment disposing of Petitioners' affirmative claims which would at a minimum constitute a complete set off and thus eliminate Respondent's claim filed in the bankruptcy court was a transfer as defined by 11 U.S.C. §101(54) (Appendix, Section I) for the purpose of finding that such state court judgment was a fraudulent transfer of Petitioners' assets pursuant to 11 U.S.C. §548. However, the Circuit Court determined that the judgments below should be affirmed because, as a matter of law, Petitioners could not show that they received less than a reasonably equivalent value in exchange for the transfer, an element necessary to avoid the transfer under 11 U.S.C. §548(a)(2)(A). In so doing the Court of Appeals ignored the fact that the Bankruptcy Court made no findings or conclusions on a material issue. Indeed, the Bankruptcy Court never considered any issues other than the question of whether a transfer occurred. (*Rulings,* Exhibit D to the Appendix). The Court of Appeals stated it could affirm the Bankruptcy Court's dismissal of Petitioner' Section 548 action because the record otherwise supported the decision.[1]

However, the record does not support the conclusion of the Court of Appeals. The record is replete with evidence of the value of the claims transferred involuntarily by Petitioners notwithstanding the Bankruptcy Court's abrupt ruling in the middle of the trial that no transfer had occurred as a matter of law. (See Exhibit H of the Appendix). The only aspect of the record relied upon by the Court of Appeals was the state court judgment. The Court of Appeals held that because a judgment based upon an alleged discovery abuse is a judgment on the merits under Texas law, that it could ignore the record of the

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[1] The Petitioners' action referred to by the Court of Appeals as a "§548 action" was procedurally an objection to Respondent's proof of claim and a counterclaim to Respondent's Complaint to Determine Dischargeability. The Dischargeability Complaint was dismissed without prejudice. See Sections C and D, pp. D5-D6 and C2 of the Appendix.

value of the lost claims and reach the erroneous tautological conclusion that because Petitioners lost, Petitioner's claims must have been without value.[2] Of course, this reasoning merely assumes the result and is without foundation. The Court of Appeal's ruling would of necessity mean that any time a Debtor lost a case for any reason that its claims asserted in such case had no value as a matter of law. This is not the law and should not be utilized to preclude Petitioners from challenging Respondent's proof of claim.

ARGUMENT

Although the Court of Appeals never specifically stated that it was applying either the doctrine of res judicata or the doctrine of collateral estoppel, the effect of its decision is to do so as a matter of law. The Court of Appeals states "the judgment conclusively established that the Debtors' claims against Hawthorne had no merit." *Matter of Besing*. (Appendix, Section A, pp. A9-A10). The Court of Appeals also stated that its decision was consonant with the Full Faith and Credit Act, 28 U.S.C. §1738 (Appendix, Section J) to give the state court judgment the same preclusive effect it would have in a Texas court. The problem with this approach is that nothing in the Bankruptcy code requires giving preclusive effect to state court judgments at all times. The Bankruptcy court is a court of equity which often "looks behind" state court judgments.

For example, in the area of dischargeability, bankruptcy courts look into the circumstances surrounding a state court judgment. *Matter of Allman*, 735 F.2d 863 (5th Cir. 1984), cert. denied 469 U.S. 1086 (1984); *Matter of Shuler*, 722 F.2d 1253 (5th Cir. 1984), cert. denied 469 U.S. 817 (1984). In *Matter of Shuler*, the court noted that a bankruptcy court *may* give collateral estoppel effect to subsidiary facts *actually litigated* and *necessarily decided* in a prior state court proceeding. 722 F.2d at 1256 (Emphasis added).

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[2] The concurring opinion notes the majority's tautology. *Matter of Besing* at n. 3, p. 2159 (Appendix A, p. A-11).

Moreover, state court judgments and procedures are not necessarily given preclusive effect in considering Section 548 claims. See *In Re Thrifty Dutchman, Inc.*, 97 B.R. 101 (Bankr. S.D. FLA. 1984); *Britt v. Damson*, 334 F.2d 896 (9th Cir. 1964), cert. denied 379 U.S. 966 (1965) (construing predecessor statute to Section 548). Preclusive effect must refer to the doctrines of res judicata and collateral estoppel. These doctrines cannot be applied without specific consideration of whether elements necessary for their application are present. Collateral estoppel (issue preclusion) requires that the identical issue must have been actually litigated in the state court suit. Because a default judgment or agreed judgment will not preclude issues by collateral estoppel, a judgment such as the one obtained by Respondent entered without actually litigating any claims but as a result of striking pleadings also should not invoke collateral estoppel. *Matter of Shuler, supra*; *In Re Thrifty Dutchman, Inc., supra*.

Res judicata (claim preclusion) can only apply if the first case was decided on the merits and involves the same cause of action sought to be barred in the second suit. Even if Texas law provides that a judgment based on alleged discovery abuse is a judgment on the merits, the judgment in the state court case here being considered did not decide the issues involved in this Section 548 claims objection. The question of whether the state court judgment constituted an avoidable fraudulent transfer was the issue below, and it is a decidedly different issue than the one decided by the state court. See *In Re Thrifty Dutchman, Inc., supra*, at p. 105.

Thus, the cases cited by the Court of Appeals to support its ruling are not controlling. The mere fact that state law gives preclusive effect to a judgment based on alleged discovery abuse does not require the bankruptcy court to do so when it is considering a claims objection based on the fraudulent transfer provisions of the Bankruptcy Code.

As the Court of Appeals noted in this case, state foreclosure sales conducted in accordance with state law are at best *presumed* to bring the reasonably equivalent value of the property. *Matter of Besing*. (Appendix A, p. A9 n. 14). The trustee is not

precluded as a matter of law from showing that the "totality of the circumstances" rebut the presumption. *In Re Grissom*, 955 F.2d 1440 (11th Cir. 1992). Some state foreclosure sales are judicial rather than non-judicial. Clearly neither res judicata nor collateral estoppel would preclude determining whether a judicial state foreclosure action constituted a fraudulent transfer.

Thus, the Court of Appeals has in this case carved out a special exception for state court judgments regardless of how obtained so long as the judgment is a determination on the merits under state law. No question of comity or deferring to state interests suggests that state court judgments of the type involved in this case are entitled to automatic preclusive effect while foreclosure judgments and others are not. See *In Re Thrifty Dutchman, Inc., supra.*

The Court of Appeals makes no analysis of the "totality of the circumstances" surrounding the state court judgment. That judgment show on its face that nothing was litigated and that Petitioners' claims and defenses were disposed of through sanctions including the most harsh sanction possible — the striking of pleadings. Thus, Petitioners and Respondent never truly joined issue and participated in an evidentiary hearing which could have resulted in Petitioners' obtaining affirmative relief or offset against Respondent's claim or defeating Respondent's claim.

If the "totality of the circumstances" should be examined, neither the Bankruptcy Court nor the Court of Appeals followed the correct procedure even if res judicata or collateral estoppel are applicable to these facts. The Bankruptcy Court, which rendered its opinion without a full presentation of the evidence stated that it did not address the applicability of either res judicata or cash collateral. (Section D of Appendix at page D3). Clearly the Court of Appeals applied those doctrines without addressing them.

Petitioners respectfully submit that determination of the applicability of res judicata or collateral estoppel with respect to a particular judgment requires a fact intensive analysis including an examination of the "totality of the circumstances" in the context of considering a Section 548 claim. The Court of Appeals

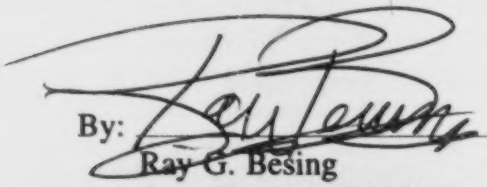
failed to make any analysis and its unsupported opinion that it was required to give preclusive effect to the state court judgment without an examination of the circumstances surrounding the award of the judgment to Respondent and without Petitioners being allowed to present a full record in the Bankruptcy Court should be reversed.

CONCLUSION

Neither the Bankruptcy Code, controlling law nor any policy consideration required the Court of Appeals to give preclusive effect to a state court judgment based on alleged discovery abuse when Petitioners assert that the state court judgment constituted a fraudulent transfer under Section 548 of the Bankruptcy Code for the purpose of objecting to Respondent's proof of claim. This court should grant this petition for Writ of Certiorari and reverse the decision of the Court of Appeals and direct a remand of this case to the Bankruptcy Court for trial.

Respectfully submitted,

LAW OFFICES OF RAY G. BESING, P.C.

By: 

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APPENDIX
TO THE
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United States Court of Appeals,
Fifth Circuit

In the Matter of
Ray G. Besing and Ray G. Besing & Associates, P.C.
Debtors,

Ray G. Besing and Ray G. Besing & Associates, P.C.
Appellants,

v.

Lyn Noble Hawthorne,
Appellee.

No. 91-7393

February 4, 1993

Judgment creditor seeking to enforce state court default judgment against Chapter 11 debtors submitted proof of claim and initiated adversary proceeding to determine dischargeability of debt. Debtors brought counterclaim asserting essentially same claims as state court had previously dismissed with prejudice as sanction for discovery abuse. The Bankruptcy Court dismissed debtors' counterclaim with prejudice finding that state court dismissal was not "transfer" which could be avoided as preference. Debtors appealed. The United States District Court for the Northern District of Texas, A. Joe Fish, J., affirmed. Debtors appealed. The Court of Appeals, King, Circuit Judge, held that: (1) debtors' contract and tort claims against judgment creditor constituted "interest in property," for purposes of preferential transfer provision of Bankruptcy Code; (2) state court judgment dismissing debtors' claims with prejudice was final judgment operating to bar debtors from

reasserting their claims in state court, and thus, dismissal effected "transfer" of debtors' claims within meaning of preferential transfer provision; and (3) state court's dismissal constituted transfer for "reasonably equivalent value" as matter of law precluding preferential transfer action.

Affirmed.

Emilio M. Garza, Circuit Judge, concurred specially and filed opinion.

1. **Bankruptcy 2602**

To extent state court judgment dismissing debtors' claims seeking specific performance of alleged settlement agreement or damages as sanction for discovery abuse had effect of causing debtors to part with "interest in property," dismissal constituted "transfer," which could be avoided as preferential. Bankr.Code, 11 U.S.C.A. §§ 101(54), 548.

See publication Words and Phrases for other judicial constructions and definitions.

2. **Bankruptcy 2602**

Because Bankruptcy Code's definition of "transfer," for purposes of avoidable preferences, expressly includes involuntary dispositions of property, dispositions of property which are brought about by state judicial proceedings clearly fall within its scope. Bankr.Code, 11 U.S.C.A. §§ 101(54), 548.

3. **Bankruptcy 2606**

"Interest in property," for purposes of Bankruptcy Code provision allowing avoidance of preferential transfers, includes any interest of debtor that would have been preserved for benefit of bankruptcy estate but for alleged transfer. Bankr.Code, 11 U.S.C.A. §§ 541, 548.

See publication Words and Phrases for other judicial constructions and definitions.

4. **Bankruptcy 2606**

Debtors' contract and tort claims against third party constituted "interest in property," for purposes of preferential transfer provision of Bankruptcy Code; thus, court had to look to judgment itself to determine whether judgment caused debtors to "part with" their claims so as to render dismissal of claims by state court "transfer" for purposes of Code. Bankr.Code, 11 U.S.C.A. §§ 101(54), 548.

5. **Bankruptcy 2602**

Dismissal with prejudice by Texas state court of debtors' contract and tort claims against third party as sanction for discovery abuse was final judgment which operated to bar debtors from reasserting their contract and tort claims in state court; thus, state court judgment affected "transfer" of debtors' claims against third party within meaning of avoidable preference provision of Bankruptcy Code. Bankr.Code, 11 U.S.C.A. §§ 101(54), 548.

6. **Federal Courts 420**

Under Full Faith and Credit Act, federal courts must give Texas judgment same preclusive effect it would have in Texas court. 28 U.S.C.A. § 1738.

7. **Bankruptcy 3777**

Even complete lack of findings and conclusions by bankruptcy court on material issue does not compel reversal if Court of Appeals can nevertheless fully understand and resolve issue on appeal.

8. **Bankruptcy 2650(2)**

Texas state court's disposition of debtors' tort and contract claims against third party pursuant to dismissal as sanction for discovery abuse constituted transfer "for reasonably equivalent value," as matter of law, and thus, debtors could not avoid transfer as fraudulent under Bankruptcy Code; judgment con-

clusively established that debtors' claims had no merit, and Court of Appeals would not look behind state court judgment to make independent evaluation. Bankr.Code, 11 U.S.C.A. §§ 548, 548(a)(2)(A).

9. **Bankruptcy 2650(1)**

So-called "*Durrett* rule," when mechanically applied, invalidates any transfer for less than 70% of fair market value. Bankr.Code, 11 U.S.C.A. §§ 548, 548(a)(2)(A).

See publication Words and Phrases for other judicial constructions and definitions.

10. **Bankruptcy 2726(4)**

Under totality of circumstances standard, foreclosure proceedings conducted in accordance with state law are presumed to bring reasonably equivalent value of property unless bankruptcy trustee proves that totality of circumstances rebut that presumption. Bankr.Code, 11 U.S.C.A. §§ 548, 548(a)(2)(A).

11. **Pretrial Procedure 46**

Under Texas law, dismissal of action as sanction for discovery abuse constitutes adjudication on merits.

Appeal from the United States District Court for the Northern District of Texas.

Before VAN GRAAFEILAND,* KING, and EMILIO M. GARZA, Circuit Judges.

KING, Circuit Judge:

This appeal arises from a Chapter 11 bankruptcy proceeding. Ray G. Besing and his law firm, Ray G. Besing & Associates, (jointly "the Debtors"), appeal from a bankruptcy court order dismissing an action in which they sought to invoke 11 U.S.C. § 548 to avoid a state court judgment. Concluding that

* Senior Circuit Judge of the Second Circuit, sitting by designation.

the judgment, which had dismissed with prejudice the Debtors' contract and tort claims against Lyn Noble Hawthorne ("Hawthorne"), did not constitute a "transfer" for purposes of § 548, the bankruptcy court dismissed the Debtors's action. The district court affirmed. We also affirm, although we do so on different grounds.

I.

The claims at issue here have their roots in a personal and business relationship that dates back to 1981 — the year Besing began handling legal matters for Hawthorne (then Lyn Noble). In December, 1982, Besing presented Hawthorne with a three-carat diamond ring, and the two became engaged to be married. During the year that followed, Besing and Hawthorne entered into several business ventures, including the purchase of two Arabian fillies and a tract of land located near Austin, Texas. As time passed, however, the couple's relationship deteriorated, and, in early 1984, Besing and Hawthorne called off their engagement.

In August 1984, the Debtors sued Hawthorne in Texas state court, seeking specific performance of an alleged settlement agreement or damages for breach thereof.[1] In the alternative, they sought actual and exemplary damages for interference with and conversion of the ring, the horses, and the Austin property. Hawthorne filed a counterclaim seeking a declaratory judgment that she was the sole owner of the disputed property. She also sought recovery of damages on several business debts incurred by Besing and for fraud arising from the land transaction.

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[1] According to the Debtors' complaint, Hawthorne had orally agreed to (1) either return the diamond ring or pay Besing $32,000, (2) pay Besing $42,000 in settlement of debts and accounts arising from their business ventures, and (3) indemnify Besing for any liability arising from the purchase of the Austin property. The Debtors also alleged that Hawthorne had agreed that she and Besing would jointly own and manage the horses.

On March 2, 1987, as a result of discovery abuse, the state court entered a sanction order striking the Debtors' pleadings and dismissing with prejudice their claims for affirmative recovery.[2] Shortly thereafter, the court entered a default judgment against Besing on Hawthorne's claims for affirmative recovery and granted Hawthorne's motion for summary judgment on the property ownership issues. The parties stipulated to the amount of damages, and the state court entered a final judgment in favor of Hawthorne on January 25, 1988. The Debtors appealed.

On March 25, 1988, while the state court appeal was still pending, the Debtors filed joint petitions for relief under Chapter 11 of the Bankruptcy Code. Seeking to enforce the state court judgment, Hawthorne submitted a proof of claim in the joint bankruptcy case and initiated an adversary proceeding to determine the dischargeability of the debt.[3] Besing objected to Hawthorne's claim, and the Debtors brought a counterclaim, asserting essentially the same claims as the state court had dismissed with prejudice.

Anticipating Hawthorne's res judicata defense, the Debtors argued that their claims were not barred by the adverse state court judgment because it had not become final prior to the commencement of the bankruptcy proceeding.[4] In the alterna-

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[2] This sanction is expressly authorized by Texas law. *See* Tex.R.Civ.P. 215(2)(b)(5); *see also Transamerica Natural Gas v. Powell*, 811 S.W.2d 913, 916-19 (Tex.1991); *Bodnow Corp. v. City of Hondo*, 721 S.W.2d 839, 840 (Tex.1986); *Downwind Aviation, Inc. v. Orange County*, 760 S.W.2d 336, 339 (Tex.App. — Beaumont 1988, writ denied).

[3] *See* Fed.R.BANKR.P. 4007. Hawthorne asserted that the judgment against Besing fell within one or more of the statutory exceptions to discharge set forth at 11 U.S.C. § 523.

[4] *See* 11 U.S.C. § 362(a)(1) (Automatic Stay) (staying the continuation of any judicial proceeding against the debtor that was commenced before the filing of the bankruptcy petition).

tive, the Debtors asserted that the judgment constituted a transfer of their claims against Hawthorne for which they had received no value. Thus, the Debtors argued, the judgment was subject to avoidance pursuant to 11 U.S.C. § 548(a)(2)(A) and (B)(ii),[5] and they were free to relitigate their claims in the bankruptcy proceeding.

The Debtors' finality argument became moot when the Texas Court of Appeals upheld the state trial court judgment.[6] In light of this final determination, the bankruptcy court concluded that the only aspect of the Debtors' counterclaim that "remained" was the § 548 action — that is, unless the state court judgment could be avoided pursuant to § 548, it barred relitigation of the Debtors' contract and tort claims against Hawthorne. The Debtors apparently conceded this point before the bankruptcy court, and they do not raise the issue on appeal.

After a short bench trial,[7] the bankruptcy court concluded that the state court judgment did not constitute a transfer within

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[5] The statute, in pertinent part, provides:

> The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily ... received less than a reasonably equivalent value in exchange for such transfer or obligation; and ... was engaged in business or a transaction or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital ....

11 U.S.C. § 548(a)(2)(A) and (B)(ii). Subject to limited exceptions not applicable to these facts, the debtor in possession has all of the rights and powers of a trustee. 11 U.S.C. § 1107(a).

[6] At the request of the parties, the bankruptcy court abated the adversary proceeding to allow the Debtors to pursue their appeal.

[7] The court heard testimony from Mr. Besing and Mr. Burch, a CPA who testified regarding the financial status of the Debtors at the time of the state court judgment. The parties also stipulated to the admission of substantial portions of the state court record, including the Besing Group's Second

the meaning of § 548. The court therefore dismissed the Debtors' counterclaim with prejudice. The court then overruled Besing's objection, allowed Hawthorne's claim against Besing's estate, and closed the adversary proceeding.[8] The Debtors appealed, and the district court affirmed. The Debtors now appeal from the decision of the district court.

II.

Our jurisdiction to hear this appeal is conferred by 28 U.S.C. § 158(d). *See In re Louisiana World Exposition, Inc.*, 832 F.2d 1391, 1398 (5th Cir.1987); *see also In re Moody*, 849 F.2d 902, 904 (5th Cir.), *cert. denied*, 488 U.S. 967, 109 S.Ct. 493, 102 L.Ed.2d 530 (1988); 28 U.S.C. § 157(b)(2)(core proceedings). We review the legal conclusions of the courts below, including their interpretations of the Bankruptcy Code, de novo. *In re Bradley*, 960 F.2d 502, 507 (5th Cir.1992); *In re Fussell*, 928 F.2d 712, 715 (5th Cir.1991), *cert. denied*, — U.S. — , 112 S.Ct. 1203, 117 L.Ed.2d 443 (1992); *see also In re Busenlehner*, 918 F.2d 928, 930 (11th Cir.), *cert. denied*, — U.S. — , 111 S.Ct. 2251, 114 L.Ed.2d 492 (1991).

III.

Our task on appeal is to determine whether the Texas court's judgement constituted a transfer of the Debtors' claims which is subject to avoidance under § 548(a)(2)(A) and (B)(ii).[9]

Amended Petition (their last live pleading), the Sanction Order, the trial court's Final Judgment, and the Texas Court of Appeal's mandate.

[8] Because Hawthorne's claim had been fully allowed and the confirmed plan provided for payment in full, the parties agreed that there was no reason to proceed with Hawthorne's § 523 claim. The court therefore dismissed the claim without prejudice.

[9] In the final paragraph of their brief on the transfer issue, the Debtors assert that, even if the state court judgment did not constitute a "transfer" of their claims, the damages assessed against Besing — approximately $60,000 — constitute an "obligation incurred" for which Besing received no value. See 11 U.S.C § 548(a). Thus, the Debtors argue, the money judgment is

Relying exclusively on the Bankruptcy Code's expansive definition of "transfer," the Debtors argue that the judgment may be avoided because it "forced [them] to part with [their] claims" and "quite literally took [their] claims away ... and extinguished them without a trial." Thus, the Debtors contend, the bankruptcy court erred in dismissing their § 548 action and refusing to retry their contract and tort claims against Hawthorne. We disagree.

A.

[1] What constitutes a transfer for purposes of § 548 is a question of federal bankruptcy law. *Barnhill v. Johnson*, — U.S. — , — , 112 S.Ct. 1386, 1389, 118 L.Ed.2d 39 (1992) (citing *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369-70, 65 S.Ct. 405, 407-08, 89 L.Ed. 305 (1945)). The Bankruptcy Code itself provides a definition:

> "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including the retention of title as a security interest and foreclosure of the debtor's equity of redemption.

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subject to avoidance notwithstanding this court's ultimate resolution of the transfer issue. Our review of the record reveals that the Debtors did raise this argument in their counterclaim, although they did little to urge it before the bankruptcy court. On appeal, the Debtors offer no authority to support this theory, and they make no attempt to set forth any legal argument to persuade us of its correctness. Under these circumstances, we will not address the merits of the Debtors' argument. *See* Fed.R.App.P. 28(a)(5); *Zeno v. Great Atlantic & Pacific Tea Co.*, 803 F.2d 178, 180-81 (5th Cir.1986) (issues not adequately briefed are waived and will not be considered on appeal); *see also Franceski v. Plaquemines Parish School Bd.*, 772 F.2d 197, 199 n.1 (5th Cir.1985); *Texas Mortgage Serv. Corp. v. Guadalupe Savings & Loan Assoc.*, 761 F.2d 1068, 1073-74 (5th Cir.1985.)

11 U.S.C. 101(54).[10]

As the Debtors correctly point out, Congress intended for the Code's definition of "transfer" to be as broad as possible. *See* S.REP. No. 95-989, 95th Cong.2d Sess. 27 (1978) ("A transfer is a disposition of an interest in property. The definition ... is as broad as possible."), *reprinted in* 1978 U.S.C.C.A.N. p. 5787, 5813; H.R.REP. No.95-595, 95th Cong. 1st Sess. 314 (1977) (same language), *reprinted in* 1978 U.S.C.C.A.N. p.5963, 6271. "The word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another ..." *Pirie v. Chicago Title & Trust Co.*, 182 U.S. 438, 444, 21 S.Ct. 906, 908, 45 L.Ed. 1171 (1901) (construing former section 1(30) of the Bankruptcy Act from which the current Code definition was derived). Indeed, the Code's expansive definition literally encompasses "every mode ... of ... parting with ... an interest in property." 11 U.S.C. § 101(54).[11]

[2] Moreover, because the Code's definition of "transfer" expressly includes involuntary dispositions of property, dispositions of property which are brought about by state judicial proceedings clearly fall within its scope. *See e.g., In re BFP*, 974 F.2d 1144 (9th Cir.1992) (judicial foreclosure); *Butler v. Lomas & Nettleton Co.*, 862 F.2d 1015, 1019 (3rd Cir.1988) (judicial foreclosure); *In re Hulm*, 738 F.2d 323, 326 (8th Cir.)

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[10] Due to an error in the numbering of paragraphs added by Pub.L. 101-647 (Crime Control Act of 1990), 11 U.S.C. § 101 now has two sections (54), one defining "stockbroker" and the second defining "transfer." We shall refer to the definition of "transfer" as being codified at § 101(54). *See Barnhill*, — U.S. at — n.4, 112 S.Ct. at 1389 n. 4.

[11] Circuit courts have recently construed the definition broadly enough to include dispositions of property as diverse as a leveraged buy-out, *see Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 646 (3rd Cir.1991), *cert. denied*, — U.S. —, 112 S.Ct. 1476, 117 L.Ed.2d 620 (1992), and a taxpayer's election to carry forward net operating losses, *see In re Russell*, 927 F.2d 413, 417 (8th Cir.1991).

(judicial foreclosure), *cert. denied*, 469 U.S. 990, 105 S.Ct. 398, 83 L.Ed.2d 331 (1984); *Britt v. Damson*, 334 F.2d 896, 902 (9th Cir.1964) (divorce decree, applying former section 1(30) of the Bankruptcy Act), *cert. denied*, 379 U.S. 966, 85 S.Ct. 661, 13 L.Ed.2d 560 (1965); *In re Thrifty Dutchman, Inc.*, 97 B.R. 101, 105-06 (Bankr.S.D.Fla.1988) (judgment requiring debtor to convey leasehold to holdover tenant); *In re Wallace*, 66 B.R. 834, 842-43 (Bankr.E.D.Mo.1986) (divorce decree); *In re Clausen*, 44 B.R. 41, 43-44 (Bankr.D.Minn.1984) (divorce decree); *In re Perdido Bay Country Club Estates, Inc.*, 23 B.R. 36, 41 (Bankr.S.D.Fla.1982) (judicial foreclosure); *see also In re Jones*, 20 B.R.988, 994 (Bankr.E.D.Pa.1982) (judicial foreclosure, expressly applying § 548 only). Thus, to the extent the judgment had the effect of causing the Debtors to part with an interest in property, we agree that it constituted a transfer within the meaning of § 548. *See Britt*, 334 F.2d at 902 ("[I]n deciding whether the occurrence in question was a 'transfer' we are not concerned with what label [state law] has placed upon occurrences of this kind. We do however, look to [state law] to determine what was actually done ...").

B.

[3,4] An interest in property, for purposes of § 548, includes any interest of the debtor that would have been preserved for the benefit of the bankruptcy estate but for the alleged transfer. *See In re Stevens*, 112 B.R. 175, 177 (Bankr.S.D.Tex.1989); *see also In re Hargis*, 887 F.2d 77, 79 (5th Cir.1989) (stating that the Bankruptcy Code's avoidance provisions are "exclusively geared toward protecting the rights of creditors via protection of the bankruptcy estate"), *clarified*, 895 F.2d 1025 (5th Cir.1990). Under § 541, "all legal and equitable interests of the debtor in property" become property of the bankruptcy estate. 11 U.S.C. § 541. This description is all-encompassing, and Congress intended for it to include state law claims and causes of action. *See In re Mortgageamerica*

Corp., 714 F.2d 1266, 1274 (5th Cir.1983); *see also* S.REP. No. 95-989, 95th Cong.2d Sess 82 (1978), *reprinted in* 1978 U.S.C.C.A.N. p. 5787, 5868; H.R.REP. No. 95-595, 95th Cong. 1st Sess. 367 (1977), *reprinted in* 1978 U.S.C.C.A.N. p. 5963, 6323. Texas law also recognizes claims and causes of action as interests in property. *See Renger Memorial Hosp. v. State*, 674 S.W.2d 828, 830 (Tex.App. — Austin 1984, no writ); *Garrett v. Reno Oil Co.*, 271 S.W.2d 764, 767 (Tex.Civ.App. — Fort Worth 1954, writ ref'd n.r.e.). The Debtors' contract and tort claims against Hawthorne thus constituted interests in property for purposes of § 548. We therefore look to the judgment itself to determine whether it caused the Debtors to "part with" their claims.

[5] The Debtors sued Hawthorne in Texas state court, asserting their contract and tort claims. As a result of discovery abuse by the Debtors, however, the court entered a sanction order dismissing those claims with prejudice. The sanction order was incorporated into a final judgment, and that judgment was affirmed by the Texas Court of Appeals.

[6] Because the dismissal of the Debtors' claims was a dismissal with prejudice, the final judgment operates to bar the Debtors from reasserting their contract and tort claims in state court. *See Mossler v. Shields*, 818 S.W.2d 752, 754 (Tex.1991) (dismissal with prejudice as discovery sanction constituted a determination on the merits of a claim which barred relitigation of the claims dismissed); *Logan v. First Bank of Houston*, 736 S.W.2d 927, 931 (Tex.App. — Beaumont 1987, writ ref'd n.r.e.) (dismissal with prejudice as a discovery sanction constituted a judgment on the merits of a claim which precluded the same issue from being raised as a defense in a subsequent suit between the parties). Moreover, under the Full Faith and Credit Act, 28 U.S.C. § 1738, federal courts must give the Texas judgment the same preclusive effect it would have in a Texas court. *In re Brady*, 936 F.2d 212, 217 (5th Cir.), *cert. denied*, — U.S. —

, 112 S.Ct. 657, 116 L.Ed.2d 748 (1991); *see Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 523, 106 S.Ct. 768, 771, 88 L.Ed.2d 877 (1986); *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380, 105 S.Ct. 1327, 1331, 84 L.Ed.2d 274 (1985); *Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75, 81, 104 S.Ct. 892, 896, 79 L.Ed.2d 56 (1984); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466, 102 S.Ct. 1883, 1889, 72 L.Ed.2d 262 (1982); *Allen v. McCurry*, 449 U.S. 90, 96, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980). The judgment thus effectively extinguished the Debtors' claims against Hawthorne: Prior to the judgment, the Debtors had contract and tort claims — the right to seek a judicial remedy for Hawthorne's alleged breach of contract and interference with the disputed property; in the wake of the judgment, the Debtors had no such claims — no right to seek a judicial remedy.

In light of the Bankruptcy Code's expansive definition of "transfer", which literally encompasses "every" mode of parting with an interest in property, and the express intent of Congress that this definition be read as broadly as possible, we must agree with the Debtors' contention that the Texas court's dismissal of their claims caused them to "part with" their claims. We hold, therefore, that the bankruptcy court erred in concluding that the state court judgment had not effected a "transfer" of the Debtors' claims against Hawthorne within the meaning of § 548.

C.

[7] Our resolution of the transfer issue does not, however, compel reversal. We may affirm if there are any grounds in the record to support the judgment, even if those grounds were not relied upon by the courts below. *Mangaroo v. Nelson*, 864 F.2d 1202, 1204 n.2 (5th Cir.1989); *Watts v. Graves*, 720 F.2d 1416, 1419 (5th Cir.1983). Even the complete lack of findings and conclusions by the bankruptcy court on a material issue does not compel reversal if we can nevertheless fully understand and

resolve the issue on appeal. *In re Texas Extrusion Corp.*, 836 F.2d 217, 221 (5th Cir.1988), *cert. denied*, 488 U.S. 926, 109 S.Ct. 311, 102 L.Ed.2d 330 (1988); *Cf. Pullman-Standard v. Swint*, 456 U.S. 273, 292, 102 S.Ct. 1781, 1792, 72 L.Ed.2d 66 (1982) (where findings are infirm, a remand is proper unless the record permits only one resolution of the issue). Thus, if the record otherwise supports the bankruptcy court's dismissal of the Debtors' § 548 action, we may affirm notwithstanding that court's erroneous conclusion on the transfer issue. We conclude that it does.

[8] Although the bankruptcy court found the transfer issue dispositive, the occurrence of a transfer is merely a threshold issue under § 548(a)(2)(A). To avoid the Texas court's judgment under that provision, the Debtors also must establish, *inter alia*, that they received less than a reasonably equivalent value for their claims. *See* 11 U.S.C. § 548(a)(2)(A); *see also In re McConnell*, 934 F.2d 662, 665 n. 1 (5th Cir.1991) (the debtor in possession has the burden to prove the elements of a fraudulent transfer under § 548). The Debtors' failure to establish this element would be fatal to their § 548 action.

Because the Bankruptcy Code does not define "reasonably equivalent value," the task of determining the scope of the term has been left to the courts. And while there is some disagreement as to whether the ultimate determination of reasonable equivalency is a question of law or of fact,[12] the inquiry is

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[12] *See In re Morris Communications NC, Inc.*, 914 F.2d 458, 467 (4th Cir.1990) (noting the confusion as to whether reasonable equivalency is a finding of fact or a conclusion of law). In *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201, 203 (5th Cir.1980), a panel of this court clearly held that the determination of "fair consideration" under § 548's predecessor was a question of law. The court noted, however, that the same result would have obtained under the clearly erroneous standard properly applied to findings of fact. Although we have not subsequently directly addressed the issue, we have, on at least two occasions, treated reasonable equivalency as if it were

ordinarily fact intensive. In the usual case, a court must base its determination upon subsidiary fact findings regarding the value of the property transferred and the "value"[13] received in exchange. *See e.g., In re McConnell*, 934 F.2d at 665-67 (comparing the amount of liability incurred for breaching a real estate contract to the amount of earnest money forfeited); *In re Emerald Oil Co.*, 807 F.2d 1234, 1239 (5th Cir.1987) (comparing the value of an assigned oil and gas interest to the payments made and liabilities incurred in exchange for the interest).

[9-10] Courts have developed a variety of standards for determining reasonable equivalency, frequently in the context of the attempted avoidance of state foreclosure proceedings.[14]

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a fact issue. *See In re McConnell*, 934 F.2d 662, 665 (5th Cir.1991); *In re Emerald Oil Co.*, 807 F.2d 1234, 1239 n. 7 (5th Cir.1987). Of the other circuits that have directly addressed the issue, only one appears to treat reasonable equivalency as a question of law. *See In re Bundles*, 856 F.2d 815, 821 (7th Cir.1988) (holding that the statute requires the reviewing court to make an independent assessment). Three others consider it a question of fact. *See In re Ozark Restaurant Equip. Co., Inc.*, 850 F.2d 342, 344 (8th Cir.1988) (question of fact); *In re Roco Corp.*, 701 F.2d 978, 981-82 (1st Cir.1983) (the question "appears to be a factual issue"); *Klein v. Tabatchnick*, 610 F.2d 1043, 1047-48 (2d Cir. 1979) ("Fairness of consideration is generally a question of fact.") We need not, however, decide this issue to resolve the case before us.

[13] For purposes of § 548, "'value' means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor ..." 11 U.S.C. § 548(d)(2)(A).

[14] In *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201 (5th Cir.1980), for example, a panel of this circuit applied a purely mathematical test, holding that a foreclosure sale which brought only 57.7 percent of the market value of a debtor's property was subject to avoidance. In so holding, the *Durrett* court also observed that it had found no case in which a transfer for less than 70 percent of market value had been approved. *Id.* at 203. This dictum spawned the so-called "*Durrett* rule," which, when mechanically applied, invalidates any transfer for less than 70 percent of fair market value. *See e.g., In re Wheeler*, 34 B.R. 818, 821 (Bankr.N.D.Ala.1983).

In this case, however, the property interests at sake are the Debtors' state law contract and tort claims against Hawthorne, and the challenged transfer is a Texas state court judgment, which dismissed those claims with prejudice. Under Texas law, the dismissal constituted an adjudication on the merits of the Debtors' claims. *Mossler v. Shields*, 818 S.W.2d 752, 754 (Tex.1991); *Logan v. First Bank of Houston*, 736 S.W.2d 927, 931 (Tex.App. — Beaumont 1987, writ ref'd n.r.e.); *see also In re J.A.L.*, 608 S.W.2d 819, 821 (Tex.Civ.App. — Amarillo 1980, no writ); *Zimmerman v. Texaco, Inc.*, 409 S.W.2d 607, 613-14 (Tex.Civ.App. — El Paso 1966, writ ref'd n.r.e.);

Other circuits, indeed the majority of the circuits that have addressed the issue, reject *Durrett's* purely mathematical analysis in favor of a broader "totality of the circumstances" standard. *See In re Grissom*, 955 F.2d 1440, 1445 (11th Cir.1992); *Barrett v. Commonwealth Fed. Sav. & Loan Ass'n*, 939 F.2d 20, 23-25 (3rd Cir.1991); *In re Morris Communications NC, Inc.*, 914 F.2d 458, 467 (4th Cir.1990); *In re Bundles*, 856 F.2d 815, 821 (7th Cir.1988); *In re Hulm*, 738 F.2d 323, 326 (8th Cir.), *cert. denied*, 469 U.S. 990, 105 S.Ct. 398, 83 L.Ed.2d 331 (1984). Under this standard, foreclosure proceedings conducted in accordance with state law are presumed to bring the reasonably equivalent value of a property unless the trustee proves that the totality of the circumstances rebut that presumption. *Grissom*, 955 F.2d at 1148; *Bundles*, 856 F.2d at 824. "Only in this manner," the Eleventh Circuit observed, "do we provide adequate deference to state ... proceedings ..., without unduly trammelling upon the policies of the bankruptcy laws." *Grissom*, 955 F.2d at 1149.

Two circuit courts have afforded even greater deference to state proceedings, holding that the price received at a noncollusive, regularly conducted foreclosure sale establishes reasonably equivalent value as a matter of law. *See In re BFP*, 974 F.2d 1144 (9th Cir.1992); *In re Winshall Settlor's Trust*, 758 F.2d 1136, 1139 (6th Cir.1985). In adopting this rule, the Ninth Circuit acknowledged that it undermines, so[sic] some degree, the debtor's ability to recover lost equity. *BFP*, 974 F.2d at 1148. The court nevertheless concluded that "broader considerations" required it "to give a reasonable meaning to § 548 without unduly upsetting ... state law." *Id.* at 1148-49. By doing so, the court observed, "we are able to balance bankruptcy policy and comity concerns." *Id.* at 1149.

Schenker v. City of San Antonio, 369 S.W.2d 626, 630 (Tex.Civ.App. — San Antonio 1963, writ ref'd n.r.e.); *Murphy v. Stigall*, 352 S.W.2d 918, 919 (Tex.Civ.App. — San Antonio 1962, writ ref'd).[15] The judgment conclusively established that the Debtors' claims against Hawthorne had no merit. See RESTATEMENT (SECOND) OF JUDGMENTS § 17cmt. b (1982) (if the original claim is invalid, "the effect of the judgment is to conclusively establish its invalidity"). We decline the Debtors' invitation to "look behind" the state court judgment and make an independent evaluation of the claims on their merits. Instead, we hold that the Texas court's disposition of the Debtors' claims constituted a transfer for reasonably equivalent value as a matter of law. Thus, because the Debtors cannot, as a matter of law, establish one of the essential statutory elements of their cause of action, the bankruptcy court properly dismissed the Debtors' § 548 claim.

We emphasize that our decision addresses only the disposition of state law claims by a state tribunal. It does not in any

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[15] The Debtors would have us draw a distinction in this case because the dismissal was the result of a sanction order. They argue that they "did not lose [their] claims on the merits, the trial court took them away by sanction." This, we refuse to do. As noted, supra, Texas law draws no such distinction. *See Mossler*, 818 S.W.2d at 754 (dismissal with prejudice as discovery sanction constituted a determination on the merits of a claim); *Logan*, 736 S.W.2d at 931 (dismissal with prejudice as a discovery sanction constituted a judgment on the merits of a claim). Indeed, the Texas Supreme Court has expressly recognized that the legal basis for a sanction dismissal with prejudice is the fact that "a party's hindrance of the discovery process justifies a presumption that its claims or defenses lack merit." *Transamerica Natural Gas v. Powell*, 811 S.W.2d 913, 918 (Tex.1991). We further note that, while we are bound to give the state court judgment at least the same preclusive effect it would have under state law, *see In re Brady*, 936 F.2d 212, 217 (5th Cir.), *cert. denied*, — U.S. —, 112 S.Ct. 657, 116 L.Ed.2d 748 (1991), the same result would obtain under Fifth Circuit precedent. *See In re Reed*, 861 F.2d 1381, 1382-83 (5th Cir.1988); *Dillard v. Security Pacific Brokers, Inc.*, 835 F.2d 607, 608 (5th Cir.1988).

way limit the well-established rule that other transfers of property may be subject to avoidance under the provisions of the Bankruptcy Code. Thus, we believe that it "provide[s] adequate deference to state ... proceedings ..., without unduly trammelling upon the policies of the bankruptcy laws." *In re Grissom*, 955 F.2d 1440, 1449 (11th Cir.1992). We further note that because our decision is based upon a finding of reasonable equivalency, it does not address the issue of claims lost or forfeited by a debtor with the actual intent to defraud the creditors of the bankruptcy estate. *See* 11 U.S.C. § 548(a)(1). Finally, we note that our decision is consonant with our obligation under the Full Faith and Credit Act, 28 U.S.C. § 1738, to give the Texas judgment the same preclusive effect it would have in a Texas court. *See In re Brady*, 936 F.2d 212, 217 (5th Cir.), *cert. denied*. — U.S. — , 112 S.Ct. 657, 116 L.Ed.2d 748 (1991). Texas law would not afford the Debtors the opportunity to reassert their contract and tort claims against Hawthorne. *See Mossler*, 818 S.W.2d at 754; *Logan*, 736 S.W.2d at 931. Section 548 should not operate to circumvent this result. "The Bankruptcy Code was not intended to give litigants a second chance to challenge a state court judgment nor did it intend for the Bankruptcy Court to serve as an appellate court [for state court proceedings]." *In re G & R Mfg. Co.*, 91 B.R. 991, 994 (Bankr.M.D.Fla.1988).

IV.

In sum, although we are persuaded that the Bankruptcy Code's definition of "transfer" is indeed broad enough to encompass the Texas court's dismissal of the Debtors' claims, we conclude that the Debtors cannot as a matter of law establish that they received less than a reasonably equivalent value. The bankruptcy court therefore properly dismissed the Debtors' § 548 action. For the foregoing reasons, we AFFIRM the judgment of the district court.[16]

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[16] The Debtors raise (but, again, fail to brief) two additional arguments that warrant very little discussion. First, they assert that because the bankruptcy court erred in concluding that the state court judgment did not

EMILIO M. GARZA, Circuit Judge, concurring specially:

I concur in the judgment and the majority opinion, except to the extent that it holds the state court judgment transferred the Debtors' claims within the meaning of § 548. *See maj. op.* at 2155-56. I agree with the bankruptcy court's determination that the state court judgment did not "transfer" any interest in property for the purpose of § 548. As both the bankruptcy court and the majority correctly point out, the effect of the state court judgment was to "discharge"[1] or "extinguish"[2] the Debtors' tort and contract claims.

The majority emphasizes, however, the language in 11 U.S.C. 101(54), which defines "transfer" as every mode ... of *parting with* ... an interest in property." *See supra* part III.A. The majority reasons that when the state court judgment *extinguished* the Debtor's claims, the Debtors' "part[ed] with" their claim which effected a "transfer" within the meaning of § 548. *See maj. op.* at 2155-56. I disagree. The word "transfer" suggests ownership rights passing to the possession of *another*. *See Pirie*, 182 U.S. at 444, 21 S.Ct. at 908 ("The word ... is intended to include every means and manner by which property

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constitute an avoidable transfer, that court's allowance of Hawthorne's proof of claim was clearly erroneous. This argument is rendered moot by our resolution of the § 548 issue. Second, they assert that it was clearly erroneous for the court to allow Hawthorne's claim against Ray G. Besing & Associates, P.C., because the state court judgment was rendered solely against Besing individually. Our review of the record, however, reveals a claim filed by Hawthorne in Besing's individual case, an objection filed by Besing, and an order allowing the claim as filed. We therefore find nothing in the record to support the Debtors' argument. Moreover, as the bankruptcy court correctly observed in its oral findings and conclusions, the Debtors raised only two objections to Hawthorne's claim — the lack of a final judgment and the pending adversary proceeding to avoid the judgment. Having disposed of both of these grounds, the bankruptcy court properly allowed the claim.

[1] *See* Record Excerpts for Besing at Tab 9.

[2] *See maj. op.* at 2155.

can pass from the ownership and possession of another ..."). Clearly, the state court judgment did not "transfer" those claims to Ms. Hawthorne; it did, however, determine that the Debtors' claims against Hawthorne had no merit. *See maj. op.* at 2157-58. Besing cannot "transfer" or "part with" a claim which a judgment has extinguished. *Cf. Matter of Wey*, 854 F.2d 196, 199 (7th Cir.1988) ("[W]hat actually occurred when Wey defaulted was an extinguishment of his equity interest in the hotel, not a transfer."). I would hold, under the facts of this case, that the Debtors' claims were extinguished, rather than transferred for the purposes of § 548.[3]

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[3] The tautology in part III.C. — the value of Debtors' claims, found by a state judgment to be without merit is reasonably equivalent to nothing — bolsters the obvious: One cannot transfer what one does not have.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: Ray G. Besing,

Debtor,

Lyn Noble Hawthorne,

Appellant,

vs.

Ray G. Besing and Ray G. Besing & Associates, P.C.,

Appellees.

BANKRUPTCY CASE NO.
388-31749-SAF-11

CIVIL ACTION NO.
CA 3-91-1464-G

JUDGMENT

This case was submitted on the briefs of the parties and the record on appeal. On consideration whereof, it is **ORDERED** that the order and judgment of the bankruptcy court are **AFFIRMED**.

November 21, 1991.

/s/_____
A. JOE FISH
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: Ray G. Besing,

Debtor,

Lyn Noble Hawthorne,

Appellant,

vs.

Ray G. Besing and Ray G. Besing & Associates, P.C.,

Appellees.

BANKRUPTCY CASE NO.
388-31749-SAF-11

CIVIL ACTION NO.
CA 3-91-1464-G

ORDER

This case is before the court on appeal from an order and judgment of the bankruptcy court which (1) overruled the debtors' objection to the claim of plaintiff Lyn Noble Hawthorne ("Hawthorne") founded on a state court judgment, (2) allowed Hawthorne's claim, and (3) dismissed the debtors' counterclaim that sought avoidance of the judgment as a transfer under 11 U.S.C. § 548. The bankruptcy court correctly held that entry of judgment in Hawthorne's favor because of debtors' discovery violations was not subject to avoidance under section 548. The order and judgment of the bankruptcy court are therefore **AFFIRMED**.

SO ORDERED.

November 21, 1991.

/s/_____
A. JOE FISH
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: Ray G. Besing & Assoc., P.C.,

Debtor.

BKY. NO. 388-31750-SAF-11

IN RE: Ray G. Besing,

Debtor.

BKY. NO. 388-31749-SAF-11

ORDER ALLOWING CLAIM OF
LYN NOBLE HAWTHORNE AND
OVERRULING DEBTORS' OBJECTIONS TO CLAIM

On January 23, 1991, came on before the Court Debtor Ray G. Besing & Associates, P.C., Debtor Ray G. Besing and Claimant Lyn Noble Hawthorne ("Hawthorne"), together with their respective counsel in the above-styled and numbered consolidated bankruptcy proceedings and, after consideration of the evidence, testimony and arguments of counsel, the Court is of the opinion that the Proof of Claim filed by Hawthorne is well taken. It is, therefore,

ORDERED that the Debtors' Objection to the Proof of Claim filed by Hawthorne is **OVERRULED**; and it is

FURTHER ORDERED that Hawthorne's claim is allowed in full and should be administered and paid in full as provided for under Debtors' joint Amended Plan of Reorganization confirmed by this Court.

Signed this 21st day of February, 1991.

/s/ Steven A. Felsenthal
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: Ray G. Besing,

Debtor

CASE NO.
388-31749-SAF-11
389-31750-SAF-11

ADVERSARY NO.
388-3481

RULINGS

January 24, 1991

PROCEEDINGS

THE COURT: The court is prepared to enter several orders that will dispose of this litigation. Both 523 and 548 causes of action are core matters over which this Court has jurisdiction to enter final orders. The Court is required to make findings of fact and conclusions of law when ruling on adversary complaints. Case law authorizes the Court to do that by bench ruling, and therefore this statement from the bench constitutes the Court's findings and conclusions. Consistent with civil procedure rules, the Court reserves the right to edit and amend these findings and conclusions and to supply case citations prior to the entry of the written final judgment.

The Court has, for the basis of its rulings, the State Court record which was admitted into evidence at the commencement of trial yesterday. As a result of issues raised both in opening statements and in questions that were presented to the Court at the commencement of today's session of the trial, the Court has posed certain legal questions to counsel and has now had the benefit of counsel's analysis of those issues.

The Court will first address the counterclaim, and all that remains of the counterclaim is Mr. Besing's 548 claim against plaintiff, Ms. Hawthorne. Counter-claim asserts that the State Court judgment divests and thereby transfers certain causes of action that Mr. Besing had that became property of the estate and that presumably would have passed back to Ms. Hawthorne based on the plan. The Court looks to that judgment as evidence, but not under the doctrines of res judicata or collateral estoppel. The parties have argued the effect of these doctrines for the 548 and the 523 causes of action. The Court understands that if it applied res judicata to the 548 claim the State Court judgment results in a finding that the causes of action allegedly transferred were valueless. That would result in a dismissal of the 548 cause of action. The Court need not, and therefore does not, address the applicability of either doctrine.

For 548 there must be a transfer. Bankruptcy Code tells us that a transfer is the disposing of or parting with property or an interest in property by any means, so it can be by court order or a judgment. It can be by operation of law. It can be voluntary or involuntary.

We have causes of action that are property of the estate or an interest in the estate. A cause of action can be an interest in property. But the State Court judgment did not transfer those causes of action. A transfer, be it by disposing or parting with, be it voluntary or involuntary, requires that there be a movement of that property interest from one entity, one person, one party, to another. There has to be a conveyance, voluntary or involuntary.

There wasn't any here. That's not what happened in that judgment. That judgment simply decided a cause of action. If, as Mr. Weil contends, what's really going on is determining title to property, that judgment didn't result in the transfer of title to property. If just determined rights.

Because there was no transfer, there can be no 548 cause of action. This reading of the Code accords its words their plain meaning, and it frankly answers the Court's policy concern. A judgment that stems from a sanction in State Court that's affirmed on appeal by a State Appellate Court that doesn't result in a transfer is not subject to avoidance under Section 548.

What we have as a result of that judgment is a claim and discharge issue. The judgment results in a claim; the debtor contested the claim. The plaintiff sought to have the claim or the debt declared not discharged. That's the issue here and not 548. Consequently, the Court will dismiss the 548 cause of action with prejudice.

The objection to the claim of Ms. Hawthorne was two-fold: One, that the State Court judgment had not become final; and two, that the debtor had brought this 548 adversary proceeding as a counterclaim against Ms. hawthorne. The objection specifically focused on the portion of the adversary brought by the debtor. State Court judgment is now final. The counterclaim, that is, the portion of the adversary brought by the debtor is now dismissed. There's nothing left to the objection of the claim, and therefore the claim is allowed.

Because the claim is allowed, the Court sees no reason to proceed on the 523 cause of action. The Court understands that Ms. Hawthorne, if she succeeded on 523, might be able to assert greater collection rights than other unsecured creditors under the plan, but nevertheless the Court, looking at the overall picture of the rights of all creditors relative to each, you have a plan that's been confirmed, that, if the Court is reading it correctly, provides for the payment of this allowed claim over time in full. If it's paid in full, the discharge issue need never be addressed. If it's not paid in full according to the plan, seems to me we do have a discharge issue, and it may be two-fold: The 523 and breach of plan. The Court would therefore conclude at the present time the adversary complaint ought to be closed ad-

ministratively with leave to reopen if the claim is not paid in full or if there's otherwise default under the plan.

The Court raised questions about whether the plan preserved the 548 cause of action and about disclosure. The disclosure statement disclosed the 548 counterclaim. The plan did transfer all assets to the reorganized debtor. Its lack of further discussion left the impression that creditors should accord it no value in analyzing the plan. That was both an adequate and an accurate disclosure.

The Court will note that there's been no 542, no 541 declaratory judgment. The time for that has long since passed, and no suggestion of it at all to the creditors of the estate.

I believe that this results in maybe two judgments since we have one adversary complaint, a two-pronged judgment dismissing the 548 with prejudice, closing the 523 administratively without prejudice to reopening in the event that the allowed claim is not paid in full or there's a breach or default under the confirmed plan, and that the objections to the claim are now overruled — the second order or judgment on the claims objection overruling the objections and allowing the claim.

Mr. Weil, if you or Mr. Petrocchi will prepare that, please.

The Court has admitted the State Court record, and it has ruled, based its findings and analysis on the judgments and the order and mandate of the state appellate court. The Court did give counsel leave yesterday to withdraw documents to make photocopies and substitute photocopies. If you would meet with the court reporter to get that accomplished.

The Court would finally provide that this trial was not conducted in the orthodox manner, but the civil procedure rules do, in fact, give the Court discretion to interrupt the presentation of evidence when there's a point that is a dispositive issue of law that resolves the issues. That's what we have here.

Any matter before we recess?
Mr. Wall.

MR. WALL: You know, one thing I would like to do is state for the record that we were ready to go forward with live testimony on the 548.

THE COURT: Yes, the Court will note that Mr. Besing has been ready since the case was called based on when it was called, and the Court's simply ruling he should not continue on this record to have gone through the trial when the Court determines, based on a State Court judgment, that that judgment does not result in a transfer, which means that there can't be any 548 cause of action.

Any other matter for the record before recess?

MR. WALL: Your Honor, just a moment, please. Don't have anything further, Your Honor.

THE COURT: Thank you.
Mr. Weil, anything?

MR. WEIL: Nothing further, Your Honor. Thank you.

THE COURT: Thank you. We'll be in recess.

(End of proceedings.)

THE STATE OF TEXAS
COUNTY OF DALLAS

I, Janet E. Burden, acting official court reporter in and for the United States Bankruptcy Court, Northern District of Texas, Dallas Division do hereby certify that the above and foregoing contains a true and correct transcription of all the proceedings in the above styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

WITNESS my hand this the ___ day of ___, 1991.

_____

Janet E. Burden
Acting Official Court Reporter
United States Bankruptcy Court
Northern District of Texas
Dallas Division

My Certificate Expires: 12/31/92

11 U.S.C. § 548

§ 548. Fraudulent transfers and obligations

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily-

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section —

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency that receives a margin payment, as defined in section 101(34), 741(5) or 761(15) of this title, or settlement payment, as defined in section 101(35) or 741(8) of this title, takes for value to the extent of such payment;

(C) a repo participant that receives a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, in connection with a repurchase agreement, takes for value to the extent of such payment; and

(D) a swap participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer.

F1

UNITED STATES BANKRUPTCY COURT
For the Northern District of Texas

In re: Ray G. Besing

*Debtor**

Case No. 388-31749-SAF-11

PROOF OF CLAIM

1. [*If claimant is an individual claiming for himself*] The undersigned, who is the claimant herein, resides at**

[*If claimant is a partnership claiming through a member*] The undersigned, who resides at**

is a member of
composed of the undersigned and
of**
doing business at**
and is authorized to make this proof of claim on behalf of the partnership.

[*If claimant is a corporation claiming through an authorized officer*] The undersigned, who resides at**

is the
a corporation organized under the laws of
and doing business at**
and is authorized to make this proof of claim on behalf of the corporation.

[If claimant is made by agent] The undersigned, who resides at** 1122 Colorado, Suite 315, Austin, TX 78701, is the agent of Lyn Noble Hawthorne, a/k/a Lyn Noble, a/k/a Lyn Gavin of One Briarwood East, Conroe, TX 77301, and is authorized to make this proof of claim on behalf of the claimant.

2. The debtor was, at the time of the filing of the petition initiating this case, and still is indebted [*or* liable] to this

claimant, in the sum of $60,769.80 plus properties reflected in judgments.

3. The consideration for this debt [*or* ground of liability] is as follows: fraud.

[*If filed in a chapter 7 or 13 case*] This claim consists of $59,244.06 in principal amount and $1,525.74 in additional charges [*or* no additional charges]. [*Itemize all charges in addition to principal amount of debt, state basis for inclusion and computation, and set forth any other consideration relevant to the legality of the charge.*]

10% post judgment interest charges

4. [*If the claim is founded on a writing*] The writing on which this claim is founded (*or* a duplicate thereof) is attached hereto [*or* cannot be attached for the reason set forth in the statement attached hereto].

5. [*If appropriate*] This claim is founded on an open account, which became [*or* will become] due on _____, as shown by the itemized statement attached hereto. Unless it is attached hereto or its absence explained in an attached statement, no note or other negotiable instrument has been received for the account or any part of it.

6. No judgment has been rendered on the claim except Cause No. 401,175, 200th Dist. Court, Travis Co., TX filed 1986, judgment for $59,244.06 + post judgment interest on Jan. 25, 1988.

7. The amount of all payments of this claim has been credited and deducted for the purpose of making this proof of claim.

8. This claim is not subject to any setoff or counter-claim except

9. No security interest is held for this claim except Abstract of judgment

[*If security interest in the property of the debtor is claimed*] The undersigned claims the security interest under the writing referred to in paragraph 4 hereof [or under a separate writing (or a duplicate of which) is attached hereto, or under a separate writing which cannot be attached hereto for the reason set forth in the statement attached hereto]. Evidence of perfection of such security interest is also attached hereto.

10. This claim is a general unsecured claim, except to the extent that the security interest, if any, described in paragraph 9 is sufficient to satisfy the claim. [*If priority is claimed, state the amount and basis thereof.*]

Claim No._____
(office use only)

Total Amount Claimed $60,769.80

Full name of Creditor:
Charles E. Johanson
Agent for Lyn Noble Hawthorne

Signature_/s/_____
Date: 5-7-88

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* *Includes all names used by debtor within last 6 years.*

** *State mailing address.*

IN THE DISTRICT COURT
200TH JUDICIAL DISTRICT
TRAVIS COUNTY, TEXAS

Ray G. Besing & Associates, P.C.,
and Ray G. Besing, Individually

Plaintiffs,

v.

Lyn Noble, Individually and Lyn Noble Toyota, Inc.,
Defendants.

NO. 401,175

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

On this 26th day of May, 1987, came on to be heard the Motion For Summary Judgment filed by Defendants on their counterclaim. After hearing the arguments for Plaintiffs and Defendants and after reviewing the evidence of Defendants in support of the Motion and reviewing the responses of the Plaintiffs, it appears that the Motion for Summary Judgment should be granted declaring that Defendant Lyn Noble is the owner of one hundred percent (100%) of the following items which were in controversy in this lawsuit:

1) 29.53 acres of land, more or less, out of the David Connor Survey #68, in Travis County, Texas, and being more particularly described in the deed in Vol. 8419, page 525 of the Travis County Deed Records.

2) The Arabian horse, Aristo Amber

3) The 3 carat diamond ring.

4) The Arabian horse, Alladin's Geym and the unnamed foal of Alladin's Geym born on April 21, 1986.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment is hereby granted and it is further ORDERED, ADJUDGED AND DECREED that Defendant Lyn Noble, a/k/a Lyn Hawthorne, is hereby declared the owner of one hundred percent of all right, title and interest in the following items to the exclusion of any interest which Plaintiffs may have or may have had but subject to any valid existing liens of third parties which interests were not derived through Plaintiffs:

1) 29.53 acres in Travis County, Texas, more fully described in the deed filed in Vol. 8419, page 525-527 of the Deed Records of Travis County, Texas, which deed is hereby reformed by deleting the word "Trustee";

2) The Arabian horse, Aristo Amber;

3) The 3 carat diamond ring; and

4) The Arabian horse, Alladin's Geym and its foal born on April 21, 1986.

SIGNED this 28th day of May, 1987.

/s/_____
PAUL R. DAVIS, JR.
Judge, 200th District Court

APPROVED AS TO FORM ONLY:

/s/_____
CHARLES E. JOHANSON
800 One Republic Plaza
333 Guadalupe
Austin, Texas 78701
(512) 499-1400
State Bar No. 10670300
ATTORNEY FOR DEFENDANTS

IN THE DISTRICT COURT
200TH JUDICIAL DISTRICT
TRAVIS COUNTY, TEXAS

Ray G. Besing & Associates, P.C.,
and Ray G. Besing, Individually

Plaintiffs,

v.

Lyn Noble, Individually and Lyn Noble Toyota, Inc.,

Defendants.

NO. 401,175

ORDER GRANTING DEFAULT JUDGMENT

In this 26th day of May, 1987, came on to be heard the Motion for Default Judgment filed by Defendants on their counterclaim. After hearing the arguments for Plaintiffs and Defendants and considering all the pleadings and previous actions in this case, this Court finds that the Motion has merit and is therefore granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motion for Default Judgment as to Defendants' liability on the promissory note and liability on the loan relating to the Kenyon Oil project be in all things granted. It is further ordered that a hearing on damages will be held on June 1, 1987.

SIGNED this 28th day of May, 1987.

/s/
PAUL R. DAVIS, JR.
Judge, 200th District Court

IN THE DISTRICT COURT
200TH JUDICIAL DISTRICT
TRAVIS COUNTY, TEXAS

Ray G. Besing & Associates, P.C.,
and Ray G. Besing, Individually

Plaintiffs,

v.

Lyn Noble, Individually and Lyn Noble Toyota, Inc.,

Defendants.

NO. 401,175

FINAL JUDGMENT

On the 4th day of February, 1987, came on to be heard the Motion and Supplemental Motion for Sanctions filed by Defendants and Counter-Plaintiffs Lyn Noble ("Noble") and Noble Toyota, Inc. (collectively "Defendants"), complaining of Plaintiffs and Counter-Defendants Ray G. Besing ("Besing") and Ray G. Besing & Associates, P.C. (collectively "Plaintiffs"). Based on the motions and the responses thereto of Plaintiffs, all incorporated herein by reference, Judge Paul R. Davis on March 2, 1987, entered an Order of Sanctions ("Order") against Plaintiffs in favor of Defendants, which Order is incorporated into this judgment by reference as if fully set forth herein. Under the Order, Plaintiffs' pleadings were struck and Plaintiffs' cause of action was dismissed with prejudice and a default judgment was entered against Besing on the issue of liability for fraud in favor of Noble. The Order was entered over the objections of Plaintiffs.

On April 16, 1987, Noble filed a Motion for Summary Judgment against Plaintiffs seeking declaratory relief, such motion being incorporated into this judgment by reference. On May 4, 1987, Noble filed a Motion for Default Judgment seeking

judgment against Besing for matters set forth therein, which motion is incorporated herein by reference. On May 8, 1987, Intervenor Turner, Collie & Braden filed a Motion for Default Judgment against Besing seeking recovery of services and attorney's fees, which motion is incorporated herein by reference.

On May 28, 1987, Judge Paul R. Davis entered a Summary Judgment in favor of Noble, over the objections of Plaintiffs. The May 28, 1987 Summary Judgment is incorporated herein by reference as if fully set forth herein, and is made final by this Judgment.

On May 28, 1987, Judge Paul R. Davis struck Plaintiffs' First Amended Original Answer and entered a Default Judgment against Besing in favor of Noble on liability for a promissory note and a Kenyon Oil loan. The Default Judgment was rendered following the entry of the Order and over the objections of Plaintiffs. The Default Judgment is incorporated by reference as if fully set forth herein and is made final by this Judgment. The parties have stipulated, subject to Plaintiffs' objections to the entering of the Default Judgment, and all other objections herein, that the amount due to Noble by Besing is $15,793.32 inclusive of prejudgment interest of 10% per annum and 15% attorney's fees under the promissory note and $5,960.74 under the Kenyon Oil loan inclusive of prejudgment interest. The parties have further stipulated, subject to Plaintiffs' objections to the entering of the Default Judgment against Besing on the issue of liability for fraud in favor of Noble that the amount of actual damages sustained by Noble and due to Noble by Besing for the fraud is $37,500.00.

On June 1, 1987, Judge Paul R. Davis entered a Default Judgment in favor of Intervenor, Turner, Collie & Braden, over the objections of Plaintiffs, against Besing on liability for engineering services rendered on a 30-acre tract in Travis County, Texas, and for interest and attorney's fees for the collection

thereof, which is made final by this Judgment. Upon stipulation of the parties, subject to the objections of Besing to the validity of the Default Judgment, it was agreed that the amount due Intervenor from Besing was $7,042.46 for services contracted for and rendered plus $2,548.47 in interest through May 31, 1987, plus $9,000.00 in attorney's fees for the preparation of this cause of action. It was further stipulated that Noble would be liable to Intervenor in the amount of one-half of the total sum stipulated to if Intervenor was unable to collect its judgment within six months of a final judgment or final appellate opinion, whichever was later. It was further stipulated that if Besing appeals this judgment, reasonable and necessary appellate attorney's fees for Intervenor would be $5,000.00 for an appeal to the Court of Appeals, $3,000.00 if a writ of error is filed in the Texas Supreme Court, and $2,000.00 if the writ of error is granted such appellate attorney's fees to be borne solely by Besing and without cost or obligation to Noble.

On the 25th day of January, 1988, came on to be heard the above-entitled and numbered cause and Noble and Besing appeared by attorneys of record and announced ready for trial, and a jury having been waived, the case proceeded to trial on damages.

At the conclusion of the stipulation of the damages, the Court found that the damages stipulated to by the parties as set forth above, were proper, subject to the objections of Plaintiffs. It appears to the Court that judgment should be rendered against Besing in favor of Noble and Intervenor, Turner, Collie and Braden.

The Court finds that Plaintiffs' objections to the Order, entry of Summary Judgment, and the entry of the Default Judgments are noted and such motions and objections are incorporated into this judgment by reference, and have been overruled by the Court. The Court further finds that the stipulations set forth herein are stipulations as to the amount of damages

only, and that Plaintiffs deny liability and deny the entitlement of the Defendants to damages.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that Besing is liable to Noble for fraud under Section 27.01 of the Texas Business and Commerce Code and that Noble have and recover from Besing the sum of Thirty-seven Thousand Five Hundred Dollars ($37,500.00) as actual damages.

IT IS FURTHER ORDERED that Noble have and recover from Besing appellate attorney's fees in the sum of Ten Thousand Dollars ($10,00.00) in the event of an appeal to the Court of Civil Appeals, and appellate attorney's fees in the further sum of Three Thousand Dollars ($3,000.00) if a writ of error to the Supreme Court of Texas is filed, and appellate attorney's fees in the further sum of Three Thousand Dollars ($3,000.00) if the writ of error is granted. IT IS FURTHER ORDERED that this award of attorney's fees is part of the judgment hereby rendered.

IT IS FURTHER ORDERED that Intervenor, Turner, Collie & Braden, have and recover from Ray G. Besing, severally, judgment for $3,521.23; together with $1,174.23 as pre-judgment interest; together with $15,000 as attorney's fees; if Ray G. Besing does not appeal this judgment to the Court of Appeals and time for appeal has expired, then Ray G. Besing shall be entitled to a remittitur of $11,000.00 against the judgment for attorneys fees; and if Ray G. Besing does not appeal from the Court of Appeals to the Supreme Court of Texas and time for appeal has expired then Ray G. Besing shall be entitled to a remittitur of $6,000 against the judgment for attorney's fees, and if Ray G. Besing makes an application for writ of error to the Supreme Court of Texas, but the Supreme Court of Texas does not grant the application for writ of error, then Ray G. Besing shall be entitled to a remittitur of $2,000.00 against the judgment for attorney's fees; together with all costs of court; and interest

on the judgment at the rate of 10% per annum on the total judgment from the date of judgment until paid, provided that Intervenor shall not be entitled to interest on attorney's fees which are reduced by remittitur.

IT IS FURTHER ORDERED that Intervenor, Turner, Collie & Braden, recover from Lyn Noble, and Ray Besing, jointly and severally, judgment for $3,521.23; together with $1,174.23 as pre-judgment interest; together with $4,500 as attorney's fees; together with interest on the judgment at the rate of 10% per annum on the total judgment from the date of judgment until paid; provided, however, that Intervenor, Turner, Collie & Braden, shall not seek a writ of execution against Lyn Noble, a writ of garnishment against Lyn Noble, nor conduct post-judgment discovery against Lyn Noble until more than 180 days has passed since the judgment for Intervenor, Turner, Collie & Braden, in this matter is final as to all parties.

IT IS FURTHER ORDERED that Lyn Noble recover from Ray G. Besing judgment for full indemnity against Ray G. Besing for all sums Lyn Noble pays Intervenor, Turner, Collie & Braden, on the judgment in favor of Turner, Collie & Braden against Lyn Noble.

IT IS FURTHER ORDERED that the judgment hereby rendered in favor of Noble on the promissory note in tbe amount of $15,793.32 shall bear interest at the rate of ten percent (10%) per annum from the date of judgment until paid.

IT IS FURTHER ORDERED that the judgment hereby rendered in favor of Noble on the Kenyon Oil loan in the amount of $5,960.74 shall bear interest at the rate of ten percent (10%) per annum from the date of judgment until paid.

IT IS FURTHER ORDERED that the judgment hereby rendered in favor of Noble for actual damages in the amount of Thirty-seven Thousand Five Hundred and 00/100 Dollars

($37,500.00) shall bear interest at the rate of ten per cent (10%) per annum from the date of judgment until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiffs take nothing by their suit, and that Defendants be in all things discharged and go hence without day.

All costs of Court expended or incurred in this cause are hereby adjudged against Ray G. Besing. All writs and processes for the enforcement and collection of this judgment or the costs of court may issue as necessary. All other relief not expressly granted herein is denied.

SIGNED this 25th day of January, 1988.

/s/ Harry Clark
Judge Presiding

APPROVED AS TO FORM

/s/_____
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Attorneys for Intervenor

IN THE DISTRICT COURT
200TH JUDICIAL DISTRICT
TRAVIS COUNTY, TEXAS

Ray G. Besing & Associates, P.C.,
and Ray G. Besing, Individually

Plaintiffs,

v.

Lyn Noble, Individually and Lyn Noble Toyota, Inc.,
Defendants.

NO. 401,175

ORDER ON MOTION FOR SANCTIONS

On the 4th day of February, 1987, came on to be heard the Motion for Sanctions and Supplemental Motion for Sanctions of defendants Lyn Noble Hawthorne and Noble Toyota, Inc. After hearing the arguments of counsel for defendants and counsel for plaintiffs and after an extensive review of the file containing the pleading of the parties, the motions, the responses thereto, the depositions on file, defendants' requests for admissions and written interrogatories and plaintiffs' answers thereto, this Court finds the following:

1. On August 22, 1986, defendants properly served on counsel for plaintiffs request for admissions and written interrogatories. The answers were due on or before September 22, 1986. No answers were filed by plaintiffs and the requests for admissions were deemed admitted as a matter of law on that date.

2. On October 28, 1986, the court granted plaintiffs' motion to withdraw the deemed answers and extended the time for filing answers to November 7, 1986.

3. On November 5, 1986, plaintiffs filed their answers to the requests for admissions and written interrogatories. On

November 12, 1986, defendants filed a motion for sanctions against plaintiffs for failure to comply with the discovery requirements under the Texas Rules of Civil Procedure. The motion was heard on November 28, 1986. The court reviewed the answers of plaintiffs and gave plaintiffs until January 5, 1987, to justify the answers and to show the court why the answers complied with the Rules of Civil Procedure.

5. On February 4, 1987, the final hearing was held on the motions of defendants and the responses of plaintiffs.

6. The answers of the plaintiffs to the requests for admissions and interrogatories represent a serious breach of the obligations imposed on plaintiffs to respond to discovery requests under the Texas Rules of Civil Procedure. Thirty of the plaintiffs' answers to defendants' discovery requests are evasive and demonstrate to the court that the plaintiffs are playing games with the discovery process. The answers are evasive and warrant the imposition of sanctions against plaintiffs by the court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1) Plaintiffs are ordered to pay to defendants the amount of $8,818.50 in attorneys fees;

2) The pleading of the plaintiffs in this case are hereby struck;

3) The claims of relief asserted by the plaintiffs are dismissed with prejudice;

3) A default judgment is hereby rendered in favor of defendant Hawthorne on her counterclaim against plaintiffs on the issue of plaintiffs' liability for fraud;

4) The order entered by the court on October 28, 1986, allowing plaintiffs additional time to file responses to the requests for admissions is hereby set aside, the responses to the

requests for admissions are hereby struck and all requests for admissions are hereby deemed admitted as a matter of law.

SIGNED the 2nd day of March, 1987.

/s/_____
Judge Paul R. Davis

APPROVED AS TO FORM ONLY:

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/s/_____
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State Bar No. 10670300
ATTORNEY FOR DEFENDANTS

H1

IN THE DISTRICT COURT
134TH JUDICIAL DISTRICT
DALLAS COUNTY, TEXAS

Ray G. Besing & Associates, P.C.,
and Ray G. Besing,Individually

Plaintiffs,

v.

Lyn Noble, Individually and Noble Toyota, Inc.,

Defendants.

NO. 84-10377-G

PLAINTIFFS' SECOND AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Ray G. Besing & Associates, P.C., a Professional Corporation (formerly Besing, Murphy & Skelton, P.C.) [hereinafter designated as "Firm"], and Ray G. Besing, individually [hereinafter designated as "Besing"], Plaintiffs, complaining of Lyn Noble, individually,now known as Lyn Noble Hawthorne [hereinafter designated "Noble"], and Noble Toyota, Inc., a Texas corporation [hereinafter designated "Dealership"], Defendants, and for cause of action will respectfully show the following:

I.
Parties

1. Plaintiff Firm is a Professional Corporation duly incorporated under the laws of the State of Texas with its business offices in Dallas, Dallas County, Texas.

2. Plaintiff Besing is an individual who is a resident of Dallas, Dallas County, Texas.

3. Defendant Noble is an individual who is a resident of The Woodlands, Montgomery County, Texas, and may be served with process at 2805 Logrun Circle, The Woodlands, Texas 77380.

4. Defendant Dealership is a Texas corporation with its principal office and place of buşiness in Conroe, Montgomery County, Texas, and may be served with process by serving its registered agent, Lyn Noble, at 1409 Interstate 45 North, Conroe, Texas 77301.

II.
Factual Background

1. Since the spring of 1982, Plaintiff Firm has performed substantial legal services for both Defendants in a variety of civil litigation matters. Since approximately August, 1982, Plaintiff Besing and Defendant Noble have engaged in a series of business transactions, including loans, advances of funds and joint investments. Plaintiff Besing and Defendant Noble were in a relationship of confidentiality at the time these business transactions took place. Plaintiff Besing and Defendant Noble became engaged to be married in December, 1982. Due to disputes between the Plaintiffs and the Defendants in February and March, 1984, Plaintiff Firm withdrew as counsel of record for Defendants in various litigation matters and the marriage engagement with Defendant Noble was terminated.

2. In order to amicably resolve all outstanding obligations and rights between Plaintiffs and Defendants, Plaintiffs and Defendants entered into a full and complete compromise, release and settlement agreement on April 23, 1984, wherein the parties agreed:

a. That Plaintiff Besing would pay Defendant Noble the total sum of $27,897.66 in full payment of all debts owed by Besing to Noble;

b. That, although Defendants owed Plaintiff Firm the total sum of $38,443.65 in outstanding attorneys' fees and costs, the Firm would accept from Defendants as part of the settlement the sum of $28,687.02 for such fees and costs;

c. That, although Defendant Noble owed Plaintiff Besing over $250,000.00 in property value and other debts, Defendant Noble would pay Plaintiff Besing, as part of the settlement, the sum of $42,843.82;

d. That Defendant Noble would return possession of Plaintiff Besing's three-carat diamond to Plaintiff Besing;

e. That Plaintiffs and Defendants would mutually release and discharge each other from all liabilities;

f. That Plaintiff Besing and Defendant Noble would continue to jointly own and manage three horses, on an equal basis; and

g. That Defendant Noble would pay and discharge all expenses, including engineering, architecture and other fees and costs connected with Travis County property which had been purchased by Plaintiff Besing and Defendant Noble (not including certain expenses paid by Plaintiff Besing and included in item c. above).

3. Thereafter, Plaintiff Firm properly withdrew as counsel of record for Defendants in all pending litigation, Defendants paid Plaintiff Firm the reduced sum of $28,687.02, as set forth in paragraph b. above, for the fees and costs owed by Defendants to Plaintiff Firm. Plaintiff Besing, on or about June 1, 1984, tendered to Defendant Noble the sum of $27,897.66 in a cashier's check, as set forth in paragraph a. above and Plaintiffs executed and delivered to Defendants a written memorial of their April 23, 1984 compromise, release and settlement agreement, but Defendants have failed and refused and now fail and refuse to perform their remaining obligations under said partial-

ly performed settlement agreement and are in breach of said agreement.

In this connection, Plaintiff Besing again tenders to Defendant Noble the sum of $27,897.66; the written memorial of the settlement agreement, and the horse management and ownership agreement, in connection with the specific performance cause of action set out in paragraph III. below.

III.
Specific Performance

Plaintiffs will show that they entered into a complete compromise, release and settlement agreement with Defendants on April 23, 1984; that said agreement has been partially performed by Defendants and Plaintiffs, that Plaintiffs have performed and offered to perform all of their remaining obligations; but that Defendants have breached said agreement and refuse to perform their remaining obligations under said agreement. Therefore, Plaintiffs are entitled to a judgment of this Court requiring Defendants to specfically perform said agreement.

IV.
Alternative Pleadings

1. In the alternative, Plaintiffs will show the following:

a. Defendants are indebted to Plaintiff in an amount not less than $9,756.63 in unpaid attorney's fees and costs;

b. Defendant Noble has wrongfully retained possession of Plaintiff Besing's diamond, having a value in excess of $32,000.00, for which Besing seeks damages, or, in the alternative, Plaintiff Besing requests this Court order Defendant Noble to return the diamond to Plaintiff Besing;

c. That Defendant Noble owes Plaintiff Besing debts of an amount in excess of $42,000.00;

d. The Plaintiff Besing and Defendant Noble jointly acquired the horse, Aristo Amber, and that title was taken in the name of Defendant Noble;

e. Plaintiff Besing and Defendant Noble were involved in a confidential relationship at the time Plaintiff Besing and Defendant Nobel acquired the land described in Exhibit "A" attached hereto and made a part hereof for all purpose (the "Land"). During such confidential relationship, Defendant Noble fraudulently induced Plaintiff Besing to convey his undivided one-half interest in the land to Defendant Noble as Trustee for the benefit of Plaintiff Besing. Plaintiff Besing will show that such conveyance created an express trust or a constructive trust and that, despite Plaintiff Besing's repeated demands therefore, Defendant Noble wrongfully refuses to reconvey an undivided one-half interest in the Land to Plaintiff Besing. Plaintiff Besing seeks damages from Defendant Noble in an amount equal to the value of Plaintiff Besing's one-half interest in the Land, an amount of not less than $270,000.00, or, in the alternative, an order of this Court directing Defendant Noble to convey to Plaintiff Besing an undivided one-half interest in the Land.

2. Accordingly, Plaintiffs will show that, as a proximate result of Defendants' failure to pay fees and costs to Plaintiff firm, Defendant Noble's conversion of Plaintiff Besing's diamond, Defendant Noble's failure to convey one-half of Aristo Amber to Plaintiff Besing and of Defendant Noble's fraudulent and deceptive taking of Plaintiff Besing's undivided one-half in the Land, Plaintiff Firm has been damaged by Defendant's wrongful conduct in an amount equal to $9,756.63, and Plaintiff Besing has been damaged by Defendant Noble's wrongful conduct in an amount in excess of $300,000.00, for which Plaintiffs pray judgment, or, in the alternative, Plaintiff Besing prays judgment for damages in any amount in excess of $42,000.00 and that Defendant Noble be ordered to deliver to

Plaintiff Besing his diamond and reconvey to Plaintiff Besing, an undivided one-half interest in the Land.

V.
Punitive Damages

The wrongs done by Defendant Noble were aggravated by such willfulness, wantonness, and malice toward Plaintiff Besing, that the law allows the imposition of exemplary damages. Defendant Noble has been acting with an evil intent to harm Plaintiff Besing. Her conduct was intentional, willful, wanton and without justification or excuse and she acted with gross indifference to the rights of Plaintiff Besing.

VI.
Attorneys' Fees

More than 30 days prior to the filing of this action, Plaintiffs made written demand upon Defendants for performance of the aforesaid agreement. Plaintiffs have been required to employ the undersigned attorney to represent Plaintiffs in this action and,pursuant to Section 38.002 of the Texas Civil Practice and Remedies Code, Plaintiffs will show they are entitled to recover from Defendants reasonable attorneys' fees, which Plaintiffs will show are $65,000.00 for the trial hereof and the additional sums of $15,000.00 for each appeal of the judgment of this Court.

VII.
Factual Background Regarding Alladin's Geym

In February, 1984, Plaintiff Besing and Defendant Noble acquired a registered Arabian horse named Alladin's Geym. At the time of the purchase it was agreed to maintain the horse at Lasma East Farms in Kentucky where it would be bred by superior stallions and both the horse and its foals would increase in value by being kept at a prestigious farm. While the horse was pregnant, and contrary to veterinarian advice, and without

the knowledge or consent of Plaintiff Besing, Defendant Noble moved Alladin's Geym from Kentucky to Dantil Farms in Magnolia, Texas.

This move endangered the horse and the foal and incurred the expense of the move and increased expenses for the care and maintenance of the horse. In late March, 1986, the horse gave birth to a foal which Defendant Noble refuses to have registered in the joint names of Plaintiff Besing and Defendant Noble.

VIII.
Damages with Respect to Alladin's Geym

Plaintiff Besing has been damaged by Defendant Noble's wrongfully removing Alladin's Geym from their joint possession, by incurring moving expense and increased maintenance changes and for endangering the pregnant horse and unborn foal, for which Plaintiff Besing prays judgment in an amount of not less than $10,000.00 and that Defendant Noble be ordered to register the foal in the joint name of Plaintiff Besing and Defendant Noble and also be ordered to restore the horse to the joint possession of Plaintiff Besing and Defendant Noble.

WHEREFORE, Plaintiffs pray that Defendant be cited to appear and answer herein; that upon final trial hereof, this Court enter its judgment for Plaintiffs ordering specific performance of the aforesaid agreement by Defendants or, in the alternative, entering its judgment awarding to Plaintiffs damages in excess of $300,000.00 to be paid by Defendants or for damages in excess of $52,000.00 and the return of Plaintiff Besing's diamond, the conveyance to Plaintiff Besing of title to one-half of Aristo Amber, the return to joint possession of Alladin's Geym and the registration of Alladin's Geym's foal in joint names and the reconveyance of Plaintiff Besing's interest in the Land and for exemplary damages from Defendant Noble; that Plaintiffs recover their reasonable attorneys' fees, interest at the highest rate allowed by law, and all costs of court; and that

Plaintiffs recover such other and further relief as is equitable and just.

Respectfully submitted,

/s/_____
M.J. (IKE) VANDEN EYKEL
Texas Bar No. 20485500
1555 One Galleria Tower
13355 Noel Road, L.B.9
Dallas, Texas 75240-6697
(214) 960-1555
ATTORNEY FOR PLAINTIFFS

OF COUNSEL:

Seeligson, Douglass, Falconer & Vanden Eykel

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been mailed by certified mail to Mr. Christopher M. Weil, 1900 North Tower, Plaza of the Americas, Dallas, Texas 75201, Mr. Charles E. Johanson, 1122 Colorado, 315 Westgate Building, Austin, Texas 78763, Attorney for Defendants, and Kissner & Pappas 3410 West Dallas, Suite 210, Houston, Texas 77019, Attorneys for Intervenor, this 1st day of May, 1986.

/s/_____
M.J. (IKE) VANDEN EYKEL

11 U.S.C.S. § 101(54)

(54) "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption;

28 U.S.C.S. § 1738

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947.